2006

State of Utah v. Rickie L. Reber, Tex William Aatkins, & Steven Paul Thunehorst : Reply Brief

Utah Court of Appeals

IN THE UTAH SUPREME COURT

STATE OF UTAH, Petitioner/ Cross-Respondent, v. RICKIE L. REBER, TEX WILLIAM ATKINS, & STEVEN PAUL THUNEHORST, Respondents/ Cross-Petitioner.	:	Case No. 20060299-SC
STATE OF UTAH, in the interest of: C.R., A person under 18 years of age.	:	

REPLY BRIEF OF PETITIONER AND RESPONSE TO BRIEF OF CROSS-PETITIONER

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ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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STATEMENT OF THE ISSUES ON CERTIORARI REVIEW

This Court granted the State's petition for certiorari to review two specific issues raised by the court of appeals' opinions in State v. Reber, 2005 UT App 485, 128 P.3d 1211, and In re C.R., 2005 Ut App 486 (unpublished). See Opening Br. of Pet. at addenda A and B. These issues are:

(1) whether the Ute Indian Tribe has a regulatory interest in hunting throughout Indian Country, such that the Tribe is a crime victim of any illegal hunting within Indian Country in Uintah County; and

(2) whether the Ute Indian Tribe has a property interest in wildlife located throughout Indian Country, such that the Tribe is a crime victim of any illegal hunting within Indian Ccuntry in Uintah County.

The Court also granted defendant's cross-petition for certiorari to review a third issue, referenced by the court of appeals as part of a historical fact recitation. See Reber, 2005 UT App 485, ¶8. This is:

(3) whether the Uintah Band exists independently of the Ute Indian Tribe such that it retains treaty rights to hunt and fish in Indian Country and, if so, whether defendant has demonstrated membership in that band.

These are the only three issues certified for review. See Order, Opening Br. of Pet. at addendum D. Defendant now seeks to bootstrap other issues related to due process, infancy, mistake of law, and judicial bias into the grant of certiorari. See Br. of Resp. at 17-24. This attempt is improper for two reasons. First, these issues are beyond the scope of the Court's order granting certiorari. See Order, Opening Br. of Pet. at addendum D. And second, the court of appeals did not rule on these issues. See Butterfield v. Okubo, 831 P.2d 97, 101 n.2 (Utah 1992)(on certiorari review, this Court reviews the decision of the court of appeals). Certiorari review is intended to provide this Court with an opportunity to reconsider select matters of law decided by the court of appeals; it is not intended to

provide defendant with a second de novo appeal of issues previously raised but not ruled upon. Id. (citing Utah R. App. P. 46). For these reasons, the State will not respond to pages 17 through 24 of defendant's brief. Should the Court choose to address these issues, however, the State requests the opportunity for supplemental briefing. See State v. Robison, 2006 UT 65, ¶25 n.5.

POINT ONE

DEFENDANT'S RELIANCE ON UTE V IS MISPLACED BECAUSE UTE V DOES NOT EQUATE INDIAN COUNTRY WITH TRUST LAND, BECAUSE IT APPLIES ONLY TO A GEOGRAPHICAL AREA NOT AT ISSUE HERE, AND BECAUSE IT DOES NOT ANSWER THE JURISDICTIONAL QUESTION POSED BY THIS CASE

Defendant agrees with the court of appeals' conclusion that the State lacked jurisdiction over his illegal hunting in Indian Country. Defendant's reasoning, however, departs from that of the court of appeals. Relying on Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997)("Ute V"), defendant contends that "the alleged offenses took place on tribal trust lands as defined by Ute V, and [. ..], pursuant to Ute V, they are subject to exclusive tribal and federal jurisdiction." Br. of Resp. at 10. In his view, "[a]ny discussion of jurisdiction over Indian lands on the Uintah and Ouray Reservation begins and ends with Ute V." Id. Defendant's reliance is misplaced.[1]

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[1] The court of appeals also cited to Ute V, using the case to support its conclusion that "the original Uncompahgre

A. Ute V does not equate "trust" or "tribal" lands with all of Indian Country, as defendant asserts.

Defendant contends that Ute V stands for the proposition that all land within the Uintah and Ouray reservation is trust land and, therefore, beyond the ambit of state jurisdiction. See Br. of Resp. at 11. This argument fails because it misconstrues Ute V and is incorrect as a matter of law.

Defendant reaches his novel conclusion that virtually all of Indian Country is trust land by ignoring all land ownership distinctions within Indian Country. Indian Country, however, refers to geographical boundaries; trust land describes one of many forms of ownership to which land within Indian Country may be subject. See, e.g., State v. Perank, 858 P.2d 927, 934 n.9 (Utah 1992)("section 1151 defines Indian Country to include all land within a reservation"); Handbook of Federal Indian Law 188-96 (2005 ed.). Only by dismissing the reality that different entities can and do own property located within Indian Country can defendant conclude that trust lands are coextensive with Indian Country. See Opening Br. of Pet. at 10-12 (explaining distinctions in land ownership).

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reservation is . . . Indian Country, which falls under the Ute Tribe's . . . criminal jurisdiction." Reber, 2005 UT App 485, ¶9 (citing Ute V, 114 F.3d at 1530). The first part of the court's conclusion – that the Uncompahgre is Indian Country – is correct. The second part, however, is correct only insofar as defendant or the victim, if any, is Indian. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984).

Moreover, defendant's argument turns the language of Ute V on its head. Ute V expressly recognizes that trust land is only one of several categories of land ownership within the geographic boundaries of Indian Country:

> [W]e reject the argument that Indian country is confined to lands held in trust by the federal government under § 1151(c).[2] Rather, Indian country extends to all trust lands, the National Forest Lands, [and] the Uncompahgre Reservation. . .

Ute V, 114 F.3d at 1530-31; see also Ute III, 773 F.2d 1087, 1099-1100 (10th Cir. 1985)(Seymour, J., concurring) ("National forest land that is on an Indian reservation is similar to land that is privately held within a reservation; it is not 'land belonging to the Tribe or held in trust by the United States in trust for the Tribe'" (citing Montana v. United States, 450 U.S. 544, 557 (1981)). The very cases on which defendant relies, then, explicitly recognize that Indian Country encompasses not only lands held in trust for an Indian or Indian tribe but also many other kinds of land that are not held in trust.[3]

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[2] Section 1151(c) statutorily defines "Indian Country" and is found at 18 U.S.C. §1151. See Opening Br. of Pet. at addendum E.

[3] Indeed, multiple forms of ownership can be found within most Indian Country: state-owned land, federal public lands, lands owned by Indians or non-Indians in fee simple, even towns incorporated by non-Indians under state law. See William C. Canby, Jr., American Indian Law 126 (4th ed. 2004). Under defendant's interpretation, however, state-owned lands would be trust lands, held in trust by the federal government for an individual Indian or Indian tribe. The State would thus have no jurisdiction, even over crimes committed on land that it owned. Such an interpretation plainly defies reason. Similarly, if the

B. Ute V, by its plain and explicit language, applies only to the Uintah Valley reservation

Defendant's claim that Ute V controls the jurisdictional determination in this case also fails because Ute V addressed only which lands within the Uintah Valley reservation were no longer Indian Country. See Ute V, 114 F.3d at 1529 ("In particular, we must decide which lands within the Uintah Valley Reservation are no longer Indian Country after Hagen [v. Utah, 510 U.S. 399 (1994)]"). Here, all parties agreed that the crimes were committed in Indian Country.

As a general matter, the Uintah Valley reservation, established in 1861, forms the northern section of what is today the Uintah and Ouray reservation. The Uncompahgre reservation, established in 1882, forms the southern section of what is today the Uintah and Ouray reservation. See Reber, 2005 UT App. 485, ¶8 (quoting United States v. Von Murdock, 132 F.3d 534, 540 (10th Cir. 1997)). Ute V addresses the northern section only. It is undisputed that defendant committed his crime in the southern section.[4] Ute V, therefore, does not advance defendant's case.

National Forest land on which defendants Thunehorst and Atkins committed their crimes was trust land, then the National Forest would be held in trust by the federal government only for the Ute Indian Tribe. It could not simultaneously be public land owned by the federal government for the use and enjoyment of all people.

[4] Defendants Thunehorst and Atkins stipulated in the trial court that rulings made with respect to jurisdiction and Indian status in defendant Reber's case would also be binding on them. See Thunehorst R. 114; Atkins R. 112, 114.

The context in which Ute V arose demonstrates more specifically why defendant's reliance on it is misplaced. Ute V culminated sixteen years of litigation over the extent to which the Uintah Valley reservation boundaries had been diminished, rendering certain lands no longer within Indian Country. Ute V arose just after the United States Supreme Court decided Hagen v. Utah, 510 U.S. 399 (1994), which resolved a conflict between a decision of the Tenth Circuit, Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985)("Ute III"), and several decisions of the Utah Supreme Court, State v. Hagen, 858 P.2d 925 (Utah 1992); State v. Coando, 858 P.2d 926 (Utah 1992)(issued on same day as Hagen); and State v. Perank, 858 P.2d 927 (Utah 1992)(same).[5]

After the United States Supreme Court issued Hagen, the Tenth Circuit in Ute V revisited and modified Ute III. In reconciling Ute III with Hagen, Ute V specifically acknowledged that Hagen dealt only with the diminishment of the boundaries of Indian Country with respect to the Uintah Valley reservation.

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[5] The Tenth Circuit in Ute III held, among other things, that the Uintah Valley reservation had not been diminished by 1902-05 federal allotment legislation. Ute III, 773 F.2d at 1093. In contrast, the Utah Supreme Court in Hagen, Perank, and Coando held that the Uintah Valley reservation had been diminished. See Hagen, 858 P.2d at 926; Perank, 858 P.2d at 952-53; Coando, 858 P.2d at 927. The United States Supreme Court resolved the conflict in Hagen, agreeing with this Court that the reservation had been diminished. Hagen, 510 U.S. at 421-22.

Ute V, 114 F.3d at 1528. Ute V clearly acknowledges that Hagen did not affect the Indian Country status of the National Forest lands or the Uncompahgre reservation. Id. Accordingly, consistent with Hagen, Ute V did not change the status of either the National Forest lands in the northern section or the Uncompahgre reservation in the southern section, both of which remained Indian Country.

Because Ute V explicitly does not apply to the National Forest lands or the Uncompahgre reservation, it does not speak to the land on which defendants committed their crimes.[6] And even assuming arguendo that it did apply, it would simply stand for the proposition on which the parties and the court all agree, that the land on which defendants committed their crimes is Indian Country (R. 29, 263-64, 321, 364-65).

Moreover, as far back as Ute I, federal courts have recognized that the demarcation of boundaries between Indian Country and non-Indian Country is only the starting point for determining jurisdiction. See Ute Indian Tribe v. State of Utah, 521 F.Supp. 1072, 1156-57 (D. Utah 1981)("Ute I")(noting that reservation boundary determinations simplify the jurisdictional inquiry but that ultimate dispute resolution relies on

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[6] Defendants Thunehorst and Atkins hunted unlawfully on National Forest lands (R. 363-64). Defendant Reber and his son committed their crimes "just east of Bitter Creek on the Kings Well Road" in Uintah County, on the Uncompahgre (R. 584: 164; R. 68, 364; R. 50 (map reproduced in Opening Br. of Pet. at addendum F).

application of "evolving principles of federal Indian law and jurisdiction"). Ute V simply provides no guidance for the jurisdictional question in this case: who has jurisdiction when a non-Indian commits a crime in Indian Country on land that is neither owned by the Tribe nor held in trust for the Tribe? See Ute Indian Tribe v. State of Utah, 935 F.Supp. 1473, 1492 (D. Utah 1996)("Ute IV")("Defendants' simplistic 'Indian Country-equals-trust lands' equation cannot accurately define the jurisdictional landscape of the Uintah Reservation even as diminished.") The specific inquiry posed by this case must be guided by the settled principles of federal Indian law.[7]

C. Montana v. United States answers the jurisdictional question posed by this case.

Like defendant, the court of appeals adopted the "simplistic 'Indian Country-equals-trust lands' equation." Id. It thus missed the crucial distinction between Indian Country as a geographical descriptor and the many different kinds of land ownership that may occur within its boundaries. See Reber, 2005

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[7] In this case, where the parties agree that the crimes were committed in Indian Country, the inquiry proceeds directly to the next step, determining whether either the defendant or the victim, if there is one, is Indian. See Canby at 180-81. (Opening Br. of Pet. at addendum G). If defendant is not Indian and the victim, if any, is not Indian, then the State has jurisdiction. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984) ("Within Indian Country, state jurisdiction is limited to crimes by non-Indians against non-Indians . . . and victimless crimes by non-Indians"). The State's exercise of jurisdiction under these limited circumstances is thus an exception to the general rule that either the Tribe or the federal government has jurisdiction over crimes committed in Indian Country. See Cohen's Handbook of Federal Indian Law 1149-54 (2005 ed.).

UT App 485, ¶7. By so doing, the court failed to recognize that while the Tribe can regulate all hunting on trust or tribal land, it cannot regulate non-Indian hunting on non-trust land, even though both kinds of land are located within Indian Country. Montana v. United States, 450 U.S. 544, 564-66 (1981); see also South Dakota v. Bourland, 508 U.S. 679, 692 (1993)(holding that Montana's limitation on tribal authority over non-Indian hunting and fishing on non-Indian land in Indian Country applies to public land held by the Federal government). Missing this distinction within Indian Country between trust land and non-trust land, the court of appeals ran directly afoul of Montana's holding that tribal jurisdiction does not extend to non-Indians who hunt and fish on non-Indian-owned and non-trust lands.[8] Id. Because under federal law the Ute Tribe has no regulatory authority over non-Indians who unlawfully hunt within these areas, the Tribe cannot exercise jurisdiction in derogation of the State in this case.

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[8] The Reber decision has created an untenable jurisdictional gap. Under Reber, illegal non-Indian hunting committed on non-Indian land within Indian Country is no longer subject to state regulatory authority or criminal jurisdiction. In practice, the State can no longer enforce non-Indian hunting violations in state court, as it has traditionally done, even on land that the State owns. Moreover, the Ute Tribe cannot prosecute non-Indians criminally, see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), or civilly for violations on non-Indian land, see Montana, supra. Finally, because the illegal hunting occurred outside of trust land, the federal courts cannot assert authority under the federal trespass statute. See 18 U.S.C. §1165 (forbidding trespass on trust land only).

Reber violates the teaching of the United States Supreme Court in Montana and creates confusion that will only result in further litigation by treating Indian Country as if it were synonymous with trust lands. Ute V offers nothing to ameliorate this result. The decision should be reversed.

POINT TWO

THE UINTAH BAND HAS NO INDEPENDENT EXISTENCE THAT GIVES DEFENDANT, A PURPORTED MEMBER, AN INDEPENDENT RIGHT TO HUNT OR FISH IN INDIAN COUNTRY FREE OF STATE OR UTE TRIBAL REGULATION

Defendant's claimed affiliation with the Uintah band gives him no independent treaty right to hunt or fish in Indian Country free of state or Ute tribal regulation. Defendant argues to the contrary by first endorsing the court of appeals' conclusion that the State lacks jurisdiction over him for hunting in Indian Country without a permit. He then further asserts that the Ute Indian Tribe also lacks jurisdiction. See Br. of Resp. at 15. In essence, he seeks the unfettered right to hunt and fish in Indian Country based solely on his purported status as a "Uintah band" Indian.

At the outset, defendant's claims as an Indian have shifted throughout this litigation. He initially asserted that he was "a member of the Timpanogos Tribe[,] . . . a sovereign tribe whose existence pre-dates that of the United States (R. 35). Months later, in another memorandum, defendant fashioned himself a "Shoshone Indian[] of Utah Territory," disavowing his claim of

membership in the Timpanogos Tribe (R. 128). In yet another memorandum, defendant called himself a Uintah Band member of the Shoshone Indians of Utah Territory (R. 166-68). See also R. 364. While defendant asserts membership in these various entities, he has not adduced proof either that these groups are, indeed, tribal entities or that he is an enrolled member of any of them.

As to his current claimed affiliation as a Uintah Band member, defendant asserts that the Ute Indian Tribe has no jurisdiction over him because the Uintah band was "expelled" from the Ute Indian Tribe by the Ute Partition Act. Br. of Resp. at 15-16. This two-page argument, which he raised in a cross-petition for certiorari, is inadequately briefed. Pursuant to rule 24(a)(9), Utah Rules of Appellate Procedure, a reviewing court is "entitled to have the issues clearly defined with pertinent authority cited," and is not "simply a depository in which the appealing party may dump the burden of argument and research." Monson v. Carver, 928 P.2d 1017, 1024 (Utah 1996)(additional quotation and citations omitted). "[R]ule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." State v. Thomas, 961 P.2d 299, 305 (Utah 1998).

Here, while defendant baldly asserts that the Ute Partition Act "expelled" the Uintah band from the Ute Tribe, he neither quotes from the Ute Partition Act nor otherwise explains what language in the Act compels his conclusion. Indeed, he wholly

fails to apply what he alleges is dispositive law to the facts of his case. When a party does not offer any meaningful analysis to support a claim, a reviewing court should decline to reach the merits. See, e.g., State v. Gomez, 2002 UT 120, ¶29, 63 P.3d 72 (declining to address inadequately briefed issues where there was no analysis except conclusory statements that appellant was entitled to relief); State v. Gamblin, 2000 UT 44, ¶7, 1 P.3d 1108 (declining to consider issue in which appellant offered only a few sentences and a broad conclusion that he was entitled to relief). As this Court has stated, "We will not make or develop [defendant]'s arguments for him." Gomez, 2002 UT 120 at ¶20.

Even on the merits, defendant's claim fails because the status of the Uintah band in relation to the Ute Indian Tribe presents a question of federal law that the federal courts have clearly settled. The Tenth Circuit, deciding a claim identical to defendant's here, has squarely held that Uintah band members possess no right to hunt and fish independent of the Ute Indian Tribe:

> The [Ute Indian Tribe] Constitution thus makes clear that the Bands ceased to exist separately outside the Ute Tribe, that jurisdiction over what was formerly the territory of the Uintah Band was to be exercised by the Ute Tribe, and that the rights formerly vested in the Uintah Band were to be defined by the Ute Constitution and exercised by the Ute Tribe. In light of these provisions, [defendant]'s argument that the Uintah Band's hunting and fishing rights retain a separate existence and belong only to the Uintah Band is groundless.

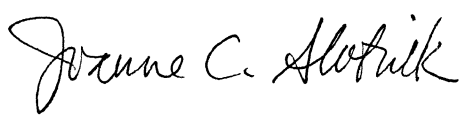
United States v. Von Murdock, 132 F.3d 534, 541 (10th Cir. 1997), cert. denied, Von Murdock v. United States, 525 U.S. 810 (1998). Without offering a cogent legal rationale for departing from this settled law, defendant seeks to relitigate in state court what the federal court has already decided and to evade federal caselaw that is directly on point. Defendant's brief is inadequate, and his argument is legally unavailing. Consequently, this Court should summarily reject his claim.

CONCLUSION

For the reasons stated, this Court should reverse the court of appeals' ruling that the State lacked jurisdiction because the Ute Indian Tribe was the victim of defendant's illegal hunting on non-Indian land within Indian Country.

RESPECTFULLY submitted this 15th day of November, 2006.

MARK L. SHURTLEFF
Attorney General



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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Michael L. Humiston, attorney for appellant, 25 West Center Street, P.O. Box 486, Heber City, Utah 84032, this 15th day of November, 2006.